SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1339

JEROME S. SPEVACK, *Petitioner,*

v.

J. WILLIAM PIKE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Jerome S. Spevack,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled action on December 22, 1966.

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[1] Petitioner here was permitted to intervene as Respondent in the Trial Court. To avoid confusion we will refer to "Spevack" and "Pike" where appropriate.

CITATIONS TO OPINIONS BELOW

The order of Judge McGarraghy of the U.S. District Court entered in this matter on April 7, 1966 (R. JA 25-26) (providing for de-impoundment of the District Court record involved on Pike's petition), is not strictly speaking an "opinion", but is printed in Appendix A hereto, *infra*, p. 1a.

The judgment of the Circuit Court of Appeals of December 22, 1966 affirming the judgment of the District Court, is printed in Appendix A, hereto, *infra*, p. 2a.

The Circuit Court of Appeals "Order" dated January 31, 1967, denying the Petition for Re-Hearing En Banc, is printed in Appendix A, *infra*, p. 3a.

In addition, the prior orders which petitioner Spevack contends should have been respected in this matter, namely, the 1959 order and opinion of this court in *Spevack* v. *Strauss, et al.*, dated March 23, 1959, 79 S. Ct. 721, 359 U.S. 115, 3 L. Ed. 2d 673 (which remanded that case to the District Court, continued the previously entered restraining orders until the Spevack patent should issue and ordered that then, the "proceedings had in the two lower courts are vacated"), and the resulting order of U.S. District Court Judge Letts in said case dated July 23, 1959, (which continued in effect the impounding of the District Court record pursuant to the aforementioned order of this Court), are printed in Appendix A, *infra*, pp. 3a and 5a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 22, 1966, and is printed as Appendix A hereto, p. 2a. Rehearing was denied on January 31, 1967 (Appendix A, *infra*, p. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

In the circumstances of this case—

A. Where in 1957, a civil action was filed by a plaintiff inventor (Spevack) in the U.S. District Court (CA 880-57) against members of the U.S. Atomic Energy Commission in their individual capacity to restrain them from alleged *ultra vires* acts in threatening to reveal the contents of said plaintiff inventor's invention pertaining to a secret process of manufacturing heavy water, which process had been revealed to said defendants some years prior to 1957, in confidence, after which they had directed plaintiff to apply for a U.S. Patent, which he had done, and after which the subject matter thereof had been placed under a "secrecy order" by the U.S. Patent Office at the instance of said defendants, and which "secrecy order" had prevented the plaintiff from revealing the process to anyone, and had accordingly prevented him from making application for foreign patents, which he desired to do, and,

B. Where, during such action in the District Court, the proceedings were held *in camera* for plaintiff's protection against damaging revelations relating to said secret process to others, and in which proceedings the defendants filed certain affidavits dealing with their activities tending toward publishing the details of the said process which activities had occurred shortly after the removal of said "secrecy order" and before plaintiff had an opportunity to apply for numerous foreign patents on said process, and which activities if made public, even now, might expose some of said plaintiff inventor's foreign patents subsequently applied for and obtained to attack as to validity based on questions raised by defendants' activities set forth in the aforementioned affidavits, and,

C. Where the several Courts, there concerned, including the U.S. Supreme Court, had, at plaintiff's instance and

for his protection, continuously impounded the U.S. District Court record including said affidavits, which impounding still remains important to said plaintiff for the reasons aforesaid, and,

D. Where, during such civil action and in the proceedings relating thereto on appeal to the U.S. Court of Appeals, and in the U.S. Supreme Court on two occasions, the U.S. Supreme Court recognized as such the *ultra vires* acts of said defendants in proposing to publish the details of said process and restrained them from publishing such until after said plaintiff's U.S. patent issued, and,

E. Where, in accordance with the 1959 mandate of the U.S. Supreme Court in said case, ordering "the proceedings" vacated, the District Court in 1959 continued in effect and refused to remove the said impounding after having been requested to discontinue same by attorneys representing said defendants, and,

F. Where the removal or withdrawal of said impounding order at this time might frustrate to a considerable extent if not completely reasons for and beneficial results flowing from said impounding order and from the other restraining orders of this Court which recognized defendant's acts as being *ultra vires inter alia* in seeking to reveal the contents of said process prior to plaintiff's application for foreign patents on said process,—

Do the acts of a patent attorney (in 1964), who had absolutely no connection with the said original 1957 action (CA 880-57), in merely filing with the District Court clerk a paper captioned "In Re Petition of J. William Pike for Access to Impounded Record" (which petition was given only a "Miscellaneous" caption and no "Civil Action" number), without filing a "complaint", *without disclosing for whom he was acting,* without the plaintiff "real party in interest" being before the Court, and in merely *mailing* a copy of his said "petition" to an attorney who had rep-

resented the plaintiff inventor in the 1957 action (Petitioner Spevack), and to an A.E.C. attorney, confer upon the District Court jurisdiction to set aside the earlier impounding order and de-impound the said record notwithstanding the 1959 order of this Court and the 1959 Order of the District Court entered pursuant thereto?

II

Even assuming arguendo, the District Court's jurisdiction in the instant matter over the subject matter and the necessary parties:

A. Was its 1966 action in de-impounding the said record in CA 880-57 a violation of this Court's 1959 order that ". . . the proceedings" in that case . . . "are vacated"?

B. Was the matter of impounding said record *res adjudicata,* having already been considered and decided as between the original adversary parties concerned?

C. Was the said District Court's order of de-impoundment, under all the circumstances, a violation of basic and fundamental Equitable principles to the maintenance of which this Court's 1959 order was directed?

III

Under the circumstances here presented, set out in Question I above, should not this Court grant certiorari in the exercise of its supervisory powers over the lower Courts, and/or to resolve a conflict between the rulings of two District Court judges?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are Federal Rules of Civil Procedure, Rules 1, 2, 3, and portions of Rules 7 and 17, and the Preamble and part of Article III, Section 2, of the Constitution (printed in Appendix B, *infra,* p. 7a).

STATEMENT

Trial Court Had No Jurisdiction of This Matter

Petitioner Spevack denies that the Trial Court acquired any jurisdiction in this matter and he properly raised this contention in the Trial Court by Motion to Dismiss, *inter alia* for want of jurisdiction (R. JA 22-25) as is more fully discussed under the heading "The Instant Matter", *infra*. Said motion was denied (Appendix A, *infra*, p. 1a, R. JA 25-26).

Facts Antecedent to the Instant Matter (Generally R. JA 6-9)

On April 10, 1957, Jerome S. Spevack filed a Complaint (CA 880-57) for an Injunction against the members of the U.S. Atomic Energy Commission requesting that they be enjoined from publishing the subject matter of Spevack's invention which he had previously revealed to them, which invention was subject to a "secrecy order". A temporary restraining order was issued.

Proceedings on Spevack's Motion for Preliminary Injunction were held *in camera* to guard against public disclosures detrimental to Spevack. *Ex parte* exhibits most of which were affidavits (hereinafter sometimes called the "affidavits") prepared by employees and agents of A.E.C. were produced on behalf of the A.E.C. Commissioners, which asserted in substance that actions alleged to constitute a "publication" by the A.E.C. had occurred prior to the institution of said suit. Spevack challenged these contentions but the Court denied his motion for injunction on the ground of mootness, solely on the basis of said affidavits and with no opportunity to cross-examine the affiants. The Court continued the injunction against disclosure by Strauss, et al., pending appeal, and ordered the entire record impounded because of said affidavits, which impounding continues until the present date.

Thereafter the said injunction against disclosure and the impounding of the record was continuously in effect through two separate opinions and decisions of the U.S. Court of Appeals, after each of which the U.S. Supreme Court granted certiorari. See *Spevack* v. *Strauss,* 101 U.S. App. D.C. 339, 248 F. 2d 752, vacated 78 S. Ct. 536, 355 U.S. 601, 2 L. Ed. 2d 525, and *Spevack* v. *Strauss*, 103 U.S. App. D.C. 204, 257 F. 2d 208, cause remanded with instructions to the District Court, 79 S. Ct. 721, 359 U.S. 115, 3 L. Ed. 2d 673.

Both Supreme Court decisions reflected the intense interest of the scientific community in protecting the interests of scientists and inventors, and in the merits of the controversy, as said decisions show that briefs *amici curiae* urging reversal were filed in each instance for the *American Chemical Society* and for the *Engineers Joint Counsel, Inc.,* scientific societies numbering many thousands of scientists among their membership.

After the Supreme Court had considered the case for the second time the injunction (stay) against disclosure, which had been issued by the Chief Justice, was continued (until Spevack's U.S. patent involving the process in question issued, etc.), with the further direction that then ". . . the proceedings heretofore had in the two lower courts are vacated" (Appendix A, *infra,* p. 3a).

On July 23, 1959, the matter came on before U.S. District Court Judge Letts at which time counsel for Strauss et al. presented an order which provided for a deimpoundment of the record (among other things). Judge Letts refused to sign the proposed order and deleted the portion providing for the deimpoundment, and then signed the order as amended (Appendix A, *infra,* p. 5a, and R. JA 16), and accordingly, the Clerk of the District Court continues to maintain the record impounded.

The Instant Matter

On January 31, 1964, the respondent, J. William Pike, a patent attorney, filed in the Clerk's office of the U.S. District Court a paper entitled "In Re Petition of J. William Pike for Access to Impounded Record", which was given the designation by the Clerk of "MISC 4-64" (R. JA 3). Pike did not identify the client for whom he was appearing but stated: "*He represents a client who is interested in determining when there was first published the subject matter of the Spevack U.S. patent application Serial No. 188,295 which eventually issued as patent No. 2,895,803.*" No summons was issued and no process was served on anyone (R. JA 1), but Pike indicated by his certificate of service that he had mailed a copy of the said petition to Joseph Y. Houghton, (JA 6), one of the attorneys representing Jerome S. Spevack in Civil Action 880-57 mentioned above which had concluded by the order signed by Judge Letts on July 23, 1959 (Appendix A, *infra*, p. 5a, R. JA 16).

The aforementioned "petition" was not served on Jerome S. Spevack, the person most interested in the impounding of the record in CA 880-57; and as mentioned above, the person whom J. William Pike was representing was not disclosed (R. JA 3).

After proceedings during which Houghton appeared in his own behalf and which culminated in a Court of Appeals ruling dismissing his appeal on the ground that he "had no authority (on his own affidavit) to submit the interest of said Jerome S. Spevack to the jurisdiction of the Court . . .", present petitioner Spevack's "Motion to Intervene as Respondent" (R. JA 17) was filed, and an order granting intervention signed (R. JA 22).

Following the intervention, Spevack's answer to Pike's "petition" (R. JA 22) and Motion to Dismiss Pike's petition (R. JA 25) were filed, Spevack's Motion was denied and Pike's "petition" was granted (R. JA 25) and Notice of Appeal was filed by Spevack. (JA 27)

The Court of Appeals affirmed the District Court without opinion (Appendix A, *infra*, p. 2a) and denied Spevack's Petition For Rehearing (Appendix A, *infra*, p. 3a).

REASONS FOR GRANTING THE WRIT

1. The writ should be granted to review and correct the failure of the courts below to follow and respect in this matter the 1959 mandate of this court in Spevack v. Strauss, et al., supra, as did Judge Letts' 1959 order entered pursuant thereto.

The mandate of this Court in *Spevack* v. *Strauss et al.*, 79 S. Ct., 721; 359 U.S. 115; 3 L. Ed. 673 included an order vacating "the proceedings had" in the two lower courts in that case, not just the judgments or orders entered therein. Judge Letts, pursuant to that mandate and order, maintained the record therein impounded. The mandate and order of this Court vacating "the proceedings had" permitted and permits no other course. To "vacate" is to annul, to make void, to make of no authority or validity, to render without force or significance. To "annul" is to reduce to nothing, to annihilate, obliterate, blot out, to do away with. For the proceedings below to be blotted out and done away with, the impounded record of such proceedings had to be blotted out and done away with, and the only way available to follow this mandate and order was to maintain it impounded, so that it would be done away with so far as the public records are concerned. This was the action Judge Letts took in 1959 in following the mandate and honoring the Order of this Court. This was the only proper action under the mandate and order of this Court.

In the ruling now entered by the District Court on petition of a third party (with no plaintiff real party in interest before it) the mandate and order of this Court are ignored, and the improper proceedings which this Court said should be obliterated are to be made a matter of public record contrary to this Court's order. And the judgment of the

Court of Appeals affirming that ruling in the present matter also disregards the 1959 mandate and order of this Court since it would condone the District Court's current refusal to honor same.

Rulings of this Court are not to be lightly disregarded. *The Standard Parts Co.* v. *Peck,* 264 U.S. 52; 44 S. Ct. 239; 68 L. Ed. 560. A function of this Court is to supervise the lower Courts. In exercise of that function and to insure respect for its pronouncements and a proper operation of the judiciary the writ here prayed should issue.

2. The writ should be granted because the plaintiff "real party in interest" is not before the court.

Pike admitted in Appellee's Brief in the Court of Appeals, page 4, that he has not stated the name of the client for whom he is acting and further in his Brief, near the bottom of page 3, after stating that he was acting for a French law firm, stated: "The French firm did not reveal its principal, and this may well be the French government."

Even *attorneys in fact* are not authorized to sue. See 3 *Moore's Federal Practice,* para. 17.10, page 1351, which states as follows:

> "*Attorney in Fact.* It has often been argued that an attorney in fact, or an agent for the sole purpose of suit, is a real party in interest. The courts, however, have uniformly denied the right in him to sue, either as a real party in interest or as a trustee of an express trust." (Citing cases)

By the same token, an action for such relief as is here sought by Pike, is required by the Rules to be brought in the name of the real party seeking the relief, and this requirement was not met by Pike's Petition. For this reason in addition to the others, the writ should be granted.

3. The writ should be granted to review and correct the failure of the District Court and Court of Appeals to dismiss respondent Pike's petition for access for want of jurisdiction under Article III, Section 2 of the Constitution of the United States and under the laws and rules of Civil Procedure enacted pursuant to the Constitution. In more detail:

(a) The Trial Court should have dismissed the petition there brought by respondent Pike, because there was no "action" pending.

Here the respondent Pike merely filed a "Petition of J. William Pike for Access to Impounded Record". This petition was given the Court Designation "Misc. 4-64". Article III, Section 2, of the Constitution of the United States prescribes that the judicial power of the United States extends to "Cases in Law and Equity". Federal Rules of Civil Procedure, Rule 1, specifies that "these rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity." F.R.C.P. Rule 2 specifies "There shall be one form of action to be known as a 'civil action'." F.R.C.P. Rule 3 states "A civil action is commenced by the filing of a complaint with the court", and F.R.C.P. Rule 17 prescribes "Every action shall be prosecuted in the name of the real party in interest; . . .". In the present matter no complaint was filed (R. JA 1), the matter was brought and has been prosecuted to date in the name of Pike, who admittedly is not the real party in interest, and no summons was served on anyone, as required by F.R.C.P. Rule 4. (R. JA 1)

(b) Respondent Pike's Petition in the Trial Court should have been dismissed because plaintiff "real party in interest" was not before the Court.

The "petition" states in part: "He represents a client who is interested in determining . . ." Thus, the real party in interest (his client) has not been disclosed and the peti-

tion violates Federal Rules of Civil Procedure—Rule 17(a), which states in part, "Every action shall be prosecuted in the name of the real party in interest . . ." The petition of Pike shows on its face that the petitioner is not the "real party in interest," that Pike therefore has no standing to seek relief affecting others under the rules, and that the courts below have disregarded the rules in holding otherwise.

(c) The respondent Pike's petition should be dismissed because there is no known statutory or other basis for the same, and the Trial Court had no jurisdiction to entertain the said "petition".

The jurisdiction of the U. S. District Courts is prescribed by statute, and should be found in either the U.S. Code, the D.C. Code, or at least there should be some mention of it in the local Civil Rules. Petitioner's counsel has been unable to discover *any* statutory or other basis either in the laws referenced above or elsewhere, or any indication as to what rules apply (other than the Federal Rules of Civil Procedure, which apply to Federal Courts generally) in this matter. In the absence of some such basis, it is submitted that the lower court has no jurisdiction to entertain respondent Pike's "petition." Respondent Pike admits, or claims, that this is not a civil action. Petitioner asks, if it is not a civil action, then what is it, what is the authority for filing it, and what rules apply?

F.R.C.P. Rule 1 provides in pertinent part that "These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81". There are no exceptions contained in Rule 81 which would exclude the present matter from the application of the Federal Rules. Certainly District Judge Letts' 1959 order entered pursuant to this Court's mandate, after

consideration of the contentions and rights of the adversary parties, should not be overruled or set aside by the unorthodox procedure followed herein by the respondent Pike, which fails to follow the rules of civil procedure promulgated for orderly proceedings in the District Court, and which relies upon a mere "petition" which is not provided for anywhere.

Consider hypothetically that the Clerk of the District Court had on deposit a sum of money, in which an undisclosed client of Attorney Pike claimed an interest, which had theretofore been ruled to be the property of some third person. It is very much doubted that Pike could obtain possession of the same for his undisclosed client by filing a "petition", and following the general procedure he has followed herein, and merely mailing a copy of his said petition to an attorney who had represented the party deemed to be the owner by the former ruling between adversary parties. While not a direct analogy, it is submitted that this hypothetical situation is sufficiently similar to show the impropriety and shortcomings of the procedure resorted to by Pike in the District Court and condoned by the Court of Appeals herein.

(d) In condoning the procedure employed by Pike, which has no foundation in the statutes and rules enacted under the Judicial Power of the United States, the Courts below have acted outside their Constitutional Jurisdiction, and the writ should issue to correct such excess.

It is, fundamental that a court *must have jurisdiction* before it can properly act. It is elementary, although sometimes overlooked, that an action must be *properly commenced* before a valid judgment or order can be entered therein, where the defendant duly raises the objection that the action was not properly commenced, as has been done in this case.

On the necessity of pleading and proving jurisdiction, neither of which Pike has done, see 1 *Moore's Federal Practice* 607, which states in pertinent part as follows:

> "*Federal Courts as Courts of Limited Jurisdiction. . . . And a party who invokes the jurisdiction of a district court for the first time must clearly show that his action is within the court's jurisdiction. . . .*" (Emphasis supplied.)
>
> ". . . The party invoking the district court's original jurisdiction has the duty of affirmatively alleging jurisdiction; and, if his allegations are properly controverted, the burden of establishing jurisdiction."

In the case of *Warren, Petitioner* v. *Arzt, Respondent,* S.D.N.Y. 1955, 18 F.R.D. 11, the petitioner, a fireman aboard a U.S. merchant vessel, was found guilty of carrying a partially smoked marijuana cigarette, and after a hearing before the Coast Guard Hearing Examiner, his Merchant Mariner's Document (license) was revoked. This was affirmed on appeal to the Commandant of the Coast Guard. He petitioned the U.S. District Court for an Order to Show Cause (against the Commandant of the Coast Guard) as to why his Document (license) should not be reinstated, etc. The court stated in pertinent part:

> "We are met immediately with a challenge to the jurisdiction of this Court on the ground that no action is pending before this Court. . . .
>
> "Rule 3 of the Rules of Civil Procedure, 28 U.S.C.A., provides: 'A civil action is commenced by filing a complaint with the court.'
>
> "Rule 4 of the Rules of Civil Procedure provides that upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service. . . .
>
> "In the present situation, no complaint was filed, no summons was issued, and no service was made upon the United States Attorney.

> "*An action may not be started by securing an order to show cause* . . . To commence an action, it is necessary that the Rules of Civil Procedure be complied with, that a complaint be filed, a summons issued, and service made as prescribed in the Rules. . . .
>
> "*Since no action has ever been commenced or is pending in this Court, this Court obviously has no jurisdiction to act.* In re Market Basket, D.C.W.D. Mo., 1954, 122 F. Supp. 321. The order to show cause issued herein is vacated and set aside as wholly void.
>
> So ordered." (Emphasis supplied.)

In *In re Rackliffe's Estate* (1937), 366 Ill. 22, 7 N.E. 2d 754, the Probate, Circuit and Appellate courts *all overlooked* the necessity of *commencement of an action.* On a hearing in probate to have one R declared incompetent, K attended as a witness, and as a result of a suggestion that K had property in her possession which belonged to R, the probate court made a turn-over order. On K's failure to comply she was ruled to show cause why she should not be punished for contempt. She objected to the jurisdiction of the court and prayed that the turn-over be eliminated; her petition was dismissed. She appealed to the circuit court, where there was a trial de novo, K again objecting that it was also without jurisdiction; the circuit court found that the property in question belonged to R. The appellate court affirmed, and was reversed by the Supreme Court on the ground that the turn-over proceeding had not been commenced against K as prescribed by statute.

The case of *In re Market Basket, Inc.,* W.D. Mo., 1954, 122 F. Supp. 321 also involved an attempt to obtain relief without "*commencing an action.*" The Court stated in pertinent part: (at p. 321)

> "Initiation of this proceeding, if in fact is was ever initiated or in truth may be called a proceeding, in this court was by an ex parte presentation by an Assistant District Attorney to the former Judge of this court of a form of order, on September 9, 1953 . . . (at p. 322)

I am wholly without any jurisdiction to determine the merits of the controversy, because no action in respect to the matter had ever been commenced or is pending in this court. Rule 3 of the Rules of Civil Procedure provides 'A civil action is commenced by filing a complaint with the court.' *Until an action has been commenced in this court, obviously, it has no jurisdiction to act.* (Citing Cases) Inasmuch as no action has been commenced or is pending in this court in respect to this matter, *it follows that jurisdiction of the court has never been invoked and that the ex parte order signed and entered herein by the court on September 9, 1953, is, and always was, wholly void* . . .

". . . this court . . . can only act when its jurisdiction has been invoked, and *that can only be done by the commencement of an action in this court, and that can only be done by filing a complaint with the court.* It follows that the ex parte order entered herein on September 9, 1953, was made without jurisdiction and is void, and, of course, the motion to set aside that void order automatically falls with the order itself. . . .

"It is therefore ordered and adjudged by the court that the order signed by the court herein on September 9, 1953, is wholly void and is set aside and for naught held." (Emphasis supplied.)

Thus, the cases cited above are similar to the proceeding attempted to be initiated here by Pike. They were efforts to obtain an adjudication of a controversy between several parties without complying with the requirements of the Federal Rules of Civil Procedure. In other words, Pike was attempting to resort to *summary proceedings* without any valid authorization, statutory or otherwise, for such method of proceeding, which must normally be authorized by statute.

In 1 *Am. Jur. 2d,* Actions, para. 3, p. 542, there is a discussion of the difference between a *proceeding, special proceeding* and *summary proceeding,* and it is stated in pertinent part as follows:

> "3. *Proceeding—Special Proceeding—Summary Proceeding* . . . (at p. 543). Special proceedings also are to be distinguished from 'summary proceedings.' A summary proceeding is a form of trial in which the ordinary course of legal proceedings is disregarded, especially in the matter of a trial by jury; *such proceedings must be authorized by legislative authority* (citing cases) except perhaps in cases of contempt." (Emphasis supplied)

In the footnote to the above quotation appears the following:

> "Summary proceedings are such proceedings as are not in accordance with the course of the common law. . . . A summary proceeding is defined as any proceeding by which a controversy is settled, case disposed of, or trial conducted in a prompt, simple manner without the aid of a jury."

That Pike's undisclosed client had an appropriate remedy (among others) see 20 *Am. Jur. 2d,* Courts, para. 62, p. 430, which states in pertinent part:

> "It has been held that mandamus will lie to compel the clerk of the court having custody of a record sealed under such a statute to perform the ministerial duty of unsealing the record upon application of a *party* . . ." (Emphasis supplied)

and F.R.C.P., Rule 81(b) provides for like relief by appropriate action. Thus, the above quotation is authority for the principle that Pike's client had an appropriate action, which he has refused to follow; and other, proper, ways of invoking the jurisdiction of the District Court by Pike's client suggest themselves, none of which were followed because inter alia they would have required disclosing the identity of Pike's client.

4. The writ should be granted to review and correct the violations of the principles of Equity Jurisprudence recognized by this Court in its 1959 Mandate in Spevack v. Strauss, supra.

Spevack revealed his improved process to the Atomic Energy Commission in confidence and the 1959 decision and order of this Court, maintaining the injunction in *Spevack* v. *Strauss et al.*, constituted a clear ruling that the Respondents there had no right to publish Spevack's invention prior to his own publication thereof by issuance of his patent, and that hence any steps they may have taken toward doing so were improper and *ultra vires.*

While there is no such equitable axiom as "that which ought not to have been done will be regarded as not having been done . . .", basic principles of equity would seem to support this as a principle of equitable jurisprudence. While it is not felt that the materials in the affidavits, if properly evaluated, would have the effect of invalidating any of Spevack's patents, the release thereof could result in litigation by those seeking to benefit therefrom and cause him much expense and harassment.

In directing that "the proceedings had in the two lower courts are vacated" the 1959 mandate of this court showed a clear recognition that Spevack is entitled to be protected against publication of the unwarranted and improper affidavits introduced into the record by the said respondents. This fact was clearly recognized by Judge Letts, and the failure of the Courts below in the present matter to adhere thereto is a clear violation of the principles of Equitable Jurisprudence.

5. The writ should be granted because this matter presents a question of importance to the community at large, as to whether orders of this Court will be respected by the lower courts, and a conflict of decision with respect thereto.

This matter presents a question of great public importance, namely: Can a mandate and order of the Supreme Court—interposed to protect an inventor's trade secrets from destruction by unauthorized publication by Government officers and to protect him from harassment by publication of impounded records pertaining to attempts to affect such destruction—be relied upon to accomplish such purpose and settle the matter; or can that mandate and order be simply disregarded by a District judge who in a separate proceeding is asked by a third party to disclose such impounded records?

This Court clearly indicated, in its 1959 decision and order in *Spevack* v. *Strauss, et al., supra,* an intent to protect Spevack not only from destruction of his property rights by improper publication by government officers, but also from harassment by publication of the impounded record in that case. The decision and order of this Court that "the proceedings heretofore had in the two lower Courts are vacated" was clearly designed to prevent such harassment, and was so treated by Judge Letts, who refused to de-impound said record. The District Judge acting in the present matter has either disregarded or taken a conflicting view of the effect to be given to the order of this Court. Certiorari should be granted so that this Court can correct this conflict of views as to the respect to be accorded its orders, and so that members of the scientific community and the public generally can rely on the fact that orders issued by this Court cannot be set aside by an inferior court to frustrate the purpose for which they were entered.

6. The writ should be granted because the deimpoundment, even now, could be harmful to Spevack, and would frustrate the efforts of this Court to shield him from any further damage than has already been done him and would be inequitable.

Finally, Pike's Petition shows no compelling or substantial reasons for according the relief sought. If, in fact, the invention in the *Spevack* v. *Strauss et al.* suit (CA 880-57) was published so that its detail became known to the public, that publication and its public availability as of that time would exist today as a matter of public record, locatable in the normal way. Any allegation in the impounded affidavits as to *efforts* made by Strauss et al. without authority of law in an *attempt* to effect a public dissemination and any opinions or conclusions stated in said affidavits with respect thereto, are immaterial to the fact of whether such *ultra vires* efforts bore fruit in the form of a publication which actually got out of the control of Strauss et al. and actually imparted knowledge of the invention to the public. If the public did not obtain and does not have that knowledge, then what the affidavits allege would not alter that fact. Thus, no persuasive reason has been shown for deimpounding the affidavits which were impounded to prevent harm to Spevack from the attempts of Strauss et al. to usurp his right of first publication.

It is of prime importance for the Court to understand that Spevack's *U. S. patent rights* are not involved here and only some of his foreign patent rights are involved, and probably only the *French* patent rights, and that the *issuance* of Spevack's U.S. patent in 1959 in *no way* diminishes or lessens the necessity of continuing the impounding of the affidavits, etc., in question. This is because, under the French Law, a publication of the details of Spevack's invention ANYWHERE IN THE WORLD before he filed his French patent application might invalidate his French patent. The French Law differs in this respect from the law of most, if not all, of the other nations where Spevack filed

foreign patent applications, in that, in those countries there must be a publication IN THE PARTICULAR COUNTRY ITSELF (as distinguished from anywhere in the world) prior in time to the filing of the patent application in the particular country in order to invalidate the patent in such country.

Thus the TIME OF FIRST PUBLICATION is of essence here. Spevack's French patent application was filed in May, 1957, approximately two years before the issuance of his U.S. patent, which U.S. patent could therefore have No EFFECT upon the validity of said French patent. On the contrary, if the details of the invention were actually published or disclosed in the United States or could be made to so appear by reference to the impounded affidavits (which this Court in substance ruled were improper and ultra vires), then Spevack's French patent, which could be extremely valuable, might be put in jeopardy. Spevack does not need or desire an indefinite impoundment of the affidavits, etc., but only needs this during the life of the French patent, which expires in May, 1977.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the District Court be directed to dismiss Pike's Petition for Access.

Respectfully submitted,

CARLETON U. EDWARDS II
1000 Vermont Avenue, N. W.
Washington, D. C.
Counsel for Petitioner
Jerome S. Spevack

APPENDIX A

[Filed April 7, 1966]

Order

This matter having come on for hearing upon the Motion of Intervenor (Jerome S. Spevack) to dismiss the "Petition of J. William Pike for Access to Impounded Record" (in Spevack v. Strauss et al., C.A. 880-57 in this Court), and upon consideration of the pleadings filed herein and a copy of the Order of Judge F. Dickinson Letts signed July 23, 1959 in said C.A. 880-57, which is a part of the impounded record in said case (a copy of which order is made a part of the record herein), and arguments of counsel in open Court, it is this 7th day of April, 1966,

ORDERED:

1. That the Intervenor's Motion to Dismiss the Petition be and the same hereby is denied;

2. That the said Petition for Access to said impounded record be and the same hereby is granted, *provided however,* that said record shall remain impounded for a period of five days from the date of the signing of this order for the purpose of giving the Intervenor time within which to file an appeal to the appropriate Court, and *provided further,* that in the event an appeal is not noted within said five day period, said record shall be released from the order of impoundment, and *provided further,* that in the event an appeal is noted to the appropriate Court, the said record shall remain impounded subject to final disposition of the matter on appeal.

JOSEPH J. MCGARRAGHY
Judge

[Certificate of Service, dated April 6, 1966]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,310

September Term, 1966

Misc. No. 4-64

JEROME S. SPEVACK, *Appellant*,

v.

J. WILLIAM PIKE, ET AL., *Appellees*.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Danaher, Circuit Judge, and Coffin, Circuit Judge of the United States Court of Appeals for the First Circuit*.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: Dec. 22, 1966

---

* Sitting by designation pursuant to Section 291(a), Title 28, U. S. Code.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,310

September Term, 1966

Misc. No. 4-64

JEROME S. SPEVACK, *Appellant*,

v.

J. WILLIAM PIKE, ET AL., *Appellees*.

Before: Bazelon, Chief Judge; and Fahy, Danaher, Burger, Wright, McGowan, Tamm, Leventhal and Robinson, Circuit Judges, in Chambers.

Order

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellant's aforesaid petition is denied.

Per Curiam

Per Curiam.

SPEVACK v. STRAUSS ET AL.

Certiorari to the United States Court of Appeals for the District of Columbia Circuit

No. 339. Argued March 5, 1959—Decided March 23, 1959.

It appearing upon oral argument that in the normal course the fee for petitioner's United States patents must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee, the case is remanded to the District Court with instructions.

Reported below: 103 U. S. App. D. C. 204, 257 F. 2d 208.

Carleton U. Edwards II and *Joseph Y. Houghton* argued the cause for petitioner. With them on the brief was *Bernard Margolius.*

Leonard B. Sand argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Loren K. Olson* and *Roland A. Anderson.*

Briefs of *amici curiae* urging reversal were filed by *Elisha Hanson, Arthur B. Hanson* and *Calvin H. Cobb, Jr.* for the American Chemical Society, and by *Carlton S. Dargusch* and *Carlton S. Dargusch, Jr.* for Engineers Joint Council, Inc.

PER CURIAM.

Upon oral argument, it appeared that in the normal course the fee for petitioner's United States patent must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee. Accordingly, the case is remanded to the District Court and that court is instructed: (1) If petitioner has by May 25, 1959, paid the patent fee for his patent, and has not requested a suspension or delay in the issuance thereof, or has withdrawn any such request theretofore made, to continue the case and the restraining orders entered herein by THE CHIEF JUSTICE until the patent issues, and then to dismiss the complaint as moot; (2) otherwise, on May 25, 1959, to dismiss the complaint on the ground that, apart from the merits of the controversy, the grant of the extraordinary equitable relief of an injunction at that stage of the proceedings would not be warranted. Upon the fulfillment of either of these conditions, the proceedings heretofore had in the two lower courts are vacated.

APPENDIX B

Constitution of the United States of America

WE THE PEOPLE of the United States in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

* * *

ARTICLE III

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

* * *

Federal Rules of Civil Procedure

Rule 1. *Scope of Rules.* Theses rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. *One Form of Action.* There shall be one form of action to be known as "civil action".

Rule 3. *Commencement of Action.* A civil action is commenced by filing a complaint with the court.

Rule 7. *Pleadings Allowed; Form of Motions.* * * *

(b) *Motions and Other Papers*

(1) An application to the court for an order shall be by a motion. . . ."

Rule 17. *Parties, Plaintiff and Defendant; Capacity.*

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; . . ."

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FILED
MAY 29 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1339

JEROME S. SPEVACK, *Petitioner*,

v.

J. WILLIAM PIKE, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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Argument in Opposition to Petitioner's Reasons for Granting the Writ

In the first place it is to be pointed out that Petitioner Spevack's statement of the questions presented and the reasons for granting the present writ are much the same as those given in the Petition for a Writ of Certiorari, identified as No. 1199 in the October Term, 1964, of this Court. In the proceedings leading up to that petition for certiorari, Spevack had failed to appear, himself, and oppose Pike's petition for access to the impounded record in *Spevack* v. *Strauss et al.*,

Civil Action No. 880-57, in spite of the fact that his patent attorney, Joseph Y. Houghton, was served with a copy of the petition for access to afford him this opportunity.

When this Court refused to grant certiorari, Spevack moved to intervene in his own behalf and this motion was granted by the District Court. The District Court, however, again granted the petition for access and the present petition for certiorari has resulted from the affirming of the lower court's ruling by the Court of Appeals. It is believed that this Court should deny the present petition for writ of certiorari as it did the earlier petition.

Petitioner assigns six reasons for his belief that this Court should grant his petition for a writ of certiorari in the present case. These reasons are set forth as follows:

> "1. The writ should be granted to review and correct the failure of the courts below to follow and respect in this matter the 1959 mandate of this court in Spevack v. Strauss, et al., supra, as did Judge Letts' 1959 order entered pursuant thereto.
>
> "2. The writ should be granted because the plaintiff 'real party in interest' is not before the court.
>
> "3. The writ should be granted to review and correct the failure of the District Court and Court of Appeals to dismiss respondent Pike's petition for access for want of jurisdiction under Article III, Section 2 of the Constitution of the United States and under the laws and rules of Civil Procedure enacted pursuant to the Constitution.
>
> "4. The writ should be granted to review and correct the violation of principles of Equity Jurisprudence recognized by this Court in its 1959 Mandate in Spevack v. Strauss, supra.

"5. The writ should be granted because this matter presents a question of importance to the community at large, as to whether orders of this Court will be respected by the lower courts, and a conflict of decision with respect thereto.

"6. The writ should be granted because the deimpoundment, even now, could be harmful to Spevack, and would frustrate the efforts of this Court to shield him from any further damage than has already been done him and would be inequitable."

It is contended that these reasons are collectively and individually without merit and that the petition for a writ of certiorari should be refused. The Petitioner's first reason in support of the granting of the writ is highly technical in nature, as has been the case with the great majority of his pleadings and arguments from the outset, and amounts to nothing more than an exercise in semantics. It is the Petitioner's position that this Court's 1959 Per Curiam opinion, set forth in full at pages 3a and 4a of Petitioner's Appendix, requires that the record in the lower court remain impounded. This is based on the Court's statement that upon the fulfillment of either of two conditions previously set forth, "the proceedings heretofore had in the two lower courts are vacated."

It is submitted that this Court says no more than that regardless of whether the District Court dismisses the complaint as moot because Petitioner has caused his patent to issue, or whether the District Court, if Petitioner has failed to effect the issuance of his patent by duly paying the normal fee, dismisses the complaint on the ground that the extraordinary relief of an injunction would not then be warranted, the effect is the same in either case in that all of the proceedings had heretofore become meaningless and hence are annulled.

This was by no means an order that the record in the District Court remain impounded, and it is believed that this Court would have expressly stated that the record was to remain impounded, if it had wanted to include this as a part of its order. It is contended that the Petitioner's interpretation of the decision in Spevack v. Strauss et al. is most inconsistent with the fact that the Respondent here was granted free access to the briefs filed during the proceedings in this Court, which briefs show that affidavits are in existence detailing what has been done by the Atomic Energy Commission in publishing the Spevack invention and revealing much as to their content.

It is true that in the final order signed by Judge Letts, a portion calling for deimpoundment of the record is struck out, but there is no indication as to why this was done. Insofar as it appears on the record, this might well have been because Judge Letts considered it superfluous in that the record was automatically deimpounded upon entering of the order.

In any event, it is Respondent's contention that the U. S. District Court for the District of Columbia has direct control over its records and that it is entirely a matter within the discretion of the Court whether the record in any particular action be impounded or not. This control is a continuing one and it is within the discretion of the Court to decide when and under what conditions a previously impounded record should be deimpounded.

There is no merit whatever to the second reason advanced in support of the granting of the petition for a writ of certiorari. Respondent is not suing anyone, but initiated the present matter by petitioning for access to the impounded record in Spevack v. Strauss

et al. This is by no means equivalent to bringing an action at law and a copy of the petition was served on the attorneys for the parties involved in the original suit merely in order that they would have an opportunity to show that they would be injured by the deimpoundment of the record, if such were the case.

The present Respondent has, however, made it clear from the outset that he was merely petitioning the Court to exercise its inherent discretionary power and deimpound a record which should have been deimpounded upon termination of the original suit. He has also made it clear from the outset that he does not believe that he has any more right to access to the impounded record than does any member of the public at large.

Reason number 3 is a perfect example of Petitioner's attempt to rely upon technicalities to defeat Respondent's petition for access to the impounded record where this is clearly not appropriate.

It is Respondent's position that every court has jurisdiction over its own records. If a court has within its discretionary powers the right to impound, for good cause shown, the record of a judicial proceeding, in the face of the recognized policy which dictates that wherever possible all such proceedings be completely open to public inspection, it certainly has the right, within this same power, to deimpound a previously impounded record if it is convinced that this is warranted by present circumstances.

It is submitted that it is perfectly proper for a member of the public to request that a court exercise its discretionary powers, as was done here. No statute is involved and certainly the Federal Rules of Civil

Procedure are not controlling in any way, since no civil action has been brought.

The cases of *Warren, Petitioner* v. *Arzt, Respondent*, S.D.N.Y. 1955, 18 F.R.D. 11; *In re Rackliffe's Estate* (1937), 366 Ill. 22, 7 N.E. 2d. 754; *In re Market Basket, Inc.*, W.D. Mo., 1954, 122 F. Supp. 321, cited by Petitioner are not seen to be pertinent, since in none of them was a court being asked to exercise its purely discretionary power to deimpound a record previously impounded.

Nor is it believed that anything of pertinence is presented by Petitioner's attempt to show that avenues other than petitioning for access were open to one seeking deimpoundment of a court record. It is believed that it was quite proper to ask the Court to deimpound the record of its own volition and within a proper exercise of its discretionary powers. The present Petitioner attempts to make something of the fact that Respondent does not name his client in the petition for access, but it will be seen that on page 3 of the present Respondent's brief as Appellee in the Court of Appeals, which portion of the brief is referred to by Petitioner on page 10 of the present petition, it is pointed out that in open court, Appellee named the French patent law firm of G. Beau deLomenie, Andre Armengaud and G. Houssard as his principal. As pointed out earlier, Respondent realized that he had no more right to gain access to the impounded record than any member of the public at large, and, accordingly, he made petition for access as an individual.

Reasons 4 and 5 given by the Petitioner for granting the writ may be treated together.

Insofar as the question of deimpoundment is based on the true merits of the situation, it is not seen, nor has it been shown, that Mr. Spevack will be in any way injured by the release of the record for public inspection. Petitioner contends in the first place that the material in the affidavits would not have the effect of invalidating any of Mr. Spevack's patents, but in the same breath speculatively says that the affidavits could result in considerable litigation and cause him much expense and harassment. Since Mr. Spevack is the patent owner, it is obvious that he would be the initiating party to any litigation and that he would not be "harassed" under any circumstance. If Petitioner means that there is something in the impounded material which would lead one to believe that a particular patent could safely be ignored, then it is in the public interest that such material be made available.

Moreover, it is believed to be obvious that the potential infringer, knowing from the briefs before the U. S. Supreme Court that the Atomic Energy Commission had asserted in the record of the District Court that it had previously published the invention, would not be any more apt to honor the patent than he would if he had been able to gain access to said record for the purposes of evaluation. If the impounded record becomes available, and one sued by Mr. Spevack attempted to employ it as a defense, Mr. Spevack would have full and ample opportunity to attack it on any proper ground.

Respondent is not concerned with the question of whether any action taken by the Atomic Energy Commission to publish Mr. Spevack's disclosure was right or wrong, but he does believe that he, or anyone else,

should have the right to determine the exact nature of this publication, assuming it is an accomplished fact.

As was pointed out earlier, the 1959 Per Curiam opinion of this Court in Spevack v. Strauss et al. does not show, as contended by Petitioner, that Spevack is entitled to be protected against publication of the affidavits introduced into the record. The opinion does not represent any decision on the merits. It merely says that the restraining orders then in effect should be maintained until Spevack made their continuance moot by issuing his patent, or, if he failed to do this, his complaint should be dismissed on the ground that the granting of an injunction would not then be appropriate. This is certainly no ruling that there should be suppressed the knowledge of acts committed by the Atomic Energy Commission *before* the restraining orders were entered.

Accordingly, the granting of the petition for access does not represent a refusal by the District Court to respect the orders of this Court. Moreover, since there was no express decision by Judge Letts that the impoundment of the record be continued then or in the future, the granting of the petition for access does not represent a conflict in the decisions of the District Court.

It is believed to be apparent that Reason 6 given for granting the writ is without merit, since it is based on the assumption, felt to be incorrect, that it is the intention of this Court to "shield" Mr. Spevack from any further damage than has already been done him. In the appeal of *Spevack* v. *Strauss et al, supra,* this Court continued the restraining orders and impoundment in effect to prevent any disclosure of Spevack's invention between the time of commencement of the

action in the Court below and the issuance of his U. S. patent, which constitutes a complete disclosure of the invention, but Respondent here can find no indication in the Per Curiam opinion (appendix 3a and 4a) that this Court evidenced any desire to suppress or conceal what may have been done to disclose the invention *prior* to commencement of the action below.

As stated earlier, Respondent believes that he, or anyone else, should have the right to inspect the record, now impounded, to determine what was *actually* done to publish the invention *before* the restraining orders were entered.

CONCLUSION

The petition for a writ of certiorari should be refused.

Respectfully submitted,

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J. William Pike

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1339

JEROME S. SPEVACK, *Petitioner,*

v.

J. WILLIAM PIKE, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1339

JEROME S. SPEVACK, *Petitioner,*

v.

J. WILLIAM PIKE, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerome S. Spevack, prays that this Court grant rehearing of its order of June 12, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled matter as prayed for in the petition filed herein on May 1, 1967.[1]

---

[1] The District Court Record herein concerned is currently impounded as the result of an order of that Court entered on July 5, 1967, set forth in Appendix A hereto.

REASONS FOR GRANTING REHEARING AND ISSUING WRIT

1. The Impounding Orders in Spevack v. Strauss et al Were Independent of the Restraining Orders Therein, and the Expiration of the Latter Did Not Remove Need for the Former.

Petitioner believes that his Petition for Certiorari did not make clear to the Court that a distinction must be borne in mind between the *restraining orders* in the *Strauss* case, and the *impounding orders* therein, and the effect and purpose of each.

The *restraining orders* were to prevent destruction of Spevack's property rights in his invention by premature and unauthorized dissemination by the A.E.C. Commissioners of materials, etc. describing his invention before his disclosure thereof by issuance of his U. S. Patent (which occurred in July 1959). The restraining orders were effective for that purpose.

The *impounding orders* were for a different purpose. Their purpose was to prevent damage to Spevack by making public certain assertions of performance of *ultra vires* acts by the Defendants, which assertions had been made in the form of incompetent affidavits prepared and submitted during the *in camera* proceedings in the *Strauss et al* case, and which, being given the color of affidavits of responsible officials, if disclosed and required to be defended against could impose great hardship on Spevack. In this connection, it is to be noted that these affidavits formed the basis for the ruling of mootness by the District Court which prevailed in the *Strauss et al* case until, in effect, set aside by this Court's 1959 Order therein.

While any member of the public is entitled to access to any publication or public dissemination made of the materials which were the subject of the restraining orders (i.e. the disclosure of Spevack's inventions), whenever such publication or public dissemination *actually* occurred, no member of the public should have any right to obtain and be in a position to harass Spevack with the impounded affidavits, etc. which were presented to the court in *in camera* proceedings by Strauss et al.

We feel that when this distinction is clearly appreciated, the public interest involved in this Court's 1959 Order in the *Strauss* case, and the need for granting certiorari herein to uphold the same, will be apparent.

2. The Court Was Not Apprised, When It Denied Certiorari, of the Pendency of Relevant Proceedings Before It in a Related Case.

The Court's Order denying Certiorari in the present matter (herein called the *Pike matter*) was entered June 12, 1967, on the last decision day before this Court adjourned for the summer recess. Under the provisions of Rule 35.4. the Clerk of this Court was apparently then holding for twenty days, following the filing thereof five days earlier (on June 7, 1967) a motion brought by Petitioner in *Spevack* v. *Strauss et al,* No. 339, October Term 1958, (herein also called the *Strauss Case*) entitled "Motion for Confirmation of Conclusive Effect of Executed Order of This Court". This twenty day period had not yet expired when this Court adjourned. Thus this Court, when it denied the petition for certiorari in this *Pike matter,* apparently was not cognizant of the following facts:

(1) The pendency of said Motion in the related *Strauss Case;*

(2) The fact that said Motion had been brought to obtain a ruling, between real parties in interest, directly related to propositions relied on as reasons for granting the writ in the Petition for Certiorari in the present case;

(3) The fact that this Court's ruling on said Motion could control the answers to questions I, IIA, IIB and IIC presented by the Petition for Certiorari; and

(4) The fact that this Court's ruling on said Motion could be determinative of all the matters raised by the Petition for Certiorari herein.

Petitioner believes that had the Court been advised of the above facts when it considered the Petition for Certiorari herein, it would have concluded that action on the Petition should be deferred pending a ruling on said Motion, and that if said ruling confirmed the conclusiveness of the Order of this Court as executed by Judge Letts in 1959, such ruling would constitute a basis for granting certiorari herein and remanding this *Pike matter* forthwith to the District Court with instructions to dismiss the Pike Petition. Under the circumstances, and for the reasons set forth in the Petition and herein, we submit that this Petition for Rehearing should be entertained and ruling thereon should be made following ruling on the "Motion for Confirmation" etc. in the *Strauss* case No. 339 O.T. 1958.

3. This Court Should Settle the Distinction, Inherent in the Petition for Certiorari, Between the Public Interest in Maintaining Impounded the Records of Civil Cases Held in Camera to Protect the Interest of the Parties, and the Public Policy of Maintaining Open Records in All Criminal Proceedings.

The Respondent in this *Pike matter* has continuously alleged (without supporting authority) that there is a "recognized policy which dictates that all . . ." (judicial) ". . . proceedings be completely open to public inspection." We submit that this unsupported assertion may have misled the Courts below and this Court, and that it indicates clearly the need for an authoritative pronouncement that there is no such broad "recognized" policy; that the policy of open and public criminal proceedings, dictated by the rejection by our society of anything approaching "star chamber" procedure, is one thing; that the policy that the courts will always be zealous to protect the interests of private litigants from being damaged unnecessarily in the courts of justice, is another thing; and that there is no conflict between these two policies. This is an important principle which should be settled by this Court, and its presence in this case warrants the grant of certiorari.

4. The Opinion of the Chief Justice, Coupled with a Full Consideration of the Petition in Light of the Present Submission, Should Be Persuasive That a Writ Should Issue.

This Court's Order denying certiorari, entered on June 12, 1967, advised:

> ". . . The Chief Justice is of the opinion that certiorari should be granted."

We call to the attention of the Court that the Chief Justice, as Circuit Justice for the District of Columbia had close association with the related cases of *Spevack* v. *Strauss et al.*, No. 641 O.T. 1957 and No. 339, O.T. 1958, and for this reason may well have had a more complete understanding of the public issues involved in the Petition for Certiorari herein than was imparted to the other members of the Court by said Petition.[2] We believe that the present Petition for Rehearing should convey a more complete understanding of such issues to the Court as a whole, and that as a result the Court as a whole will agree with the Chief Justice that "Certiorari should be granted".

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CARLETON U. EDWARDS II
Counsel for Petitioner
1000 Vermont Avenue, N. W.,
Washington, D. C.

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[2] In this connection we note that it was the Chief Justice who granted stays continuing the injunction against *Strauss et al*, in the said related cases.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CARLETON U. EDWARDS II
Counsel for Petitioner

APPENDIX A

District Court Order of July 5, 1967

Misc. 4-64

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Order

In re Petition of J. William Pike For Access to Impounded Record

Upon consideration of Intervenor's "Motion for Reconsideration. . . . ." and it appearing to the Court that the Judge who signed the order denying said motion is on vacation, it is by the Court, this 5th day of July, 1967,

ORDERED, that the record in C.A. 880-57 in this Court be re-impounded pending a hearing on Intervenor's aforementioned "Motion for Reconsideration. . . . .", which was filed July 3, 1967, or pending a ruling on Intervenor's "Application for Order Directing the United States District Court for the District of Columbia to Maintain the status quo of the Impounded Record of Proceedings in Civil Action 880-57. . . . .", which was attached as Exhibit "B" to the aforementioned "Motion for Reconsideration.", and which has been filed in the Supreme Court of the United States and has not yet been ruled upon.

[SEAL]

JOSEPH C. WADDY
Judge

ANNA M. THOMPSON
Deputy Clerk